

The ALJ based his denial of medical benefits on claimant's failure to prove the requested medical treatment was for a condition caused by the August 27, 1998 injury and also a failure to prove that additional medical treatment was necessary. Respondent raises an issue concerning the Board's jurisdiction to consider claimant's argument that she is in need of medical treatment. Therefore, the Appeals Board must first determine whether the ALJ's Order is a post-award preliminary hearing order or a final order and, if it is a preliminary hearing order, what the Appeals Board's jurisdiction is to hear this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

K.S.A. 1997 Supp. 44-551 limits the jurisdiction of the Appeals Board. The Appeals Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the ALJ exceeded his or her jurisdiction. This includes specific jurisdictional issues identified in K.S.A. 1997 Supp. 44-534a. But, even if claimant's application concerning post-award medical treatment was treated as an application for preliminary hearing, the Appeals Board would have jurisdiction because whether claimant's condition is the result of the work-related injury is the equivalent to the issue of whether the injury arose out of and in the course of claimant's employment with respondent. This issue is jurisdictional under K.S.A. 1997 Supp. 44-534a. But, in this case the ALJ also made a finding that the evidence failed to show a need for medical treatment. This is not an issue the Appeals Board has jurisdiction to consider. Thus, the jurisdictional issue could be rendered moot.

An ALJ may conduct a preliminary hearing as a part of a post-award review and modification proceeding. The Appeals Board has on many occasions approved the use of the preliminary hearing procedures as a part of a post-award application for medical treatment. The Board has done so in many cases based largely upon the fact that the trial court and the parties treated the proceedings as a preliminary hearing.

Although the preliminary hearing statute, K.S.A. 1997 Supp. 44-534a, does not specifically provide that this is also a procedure to be used post-award, there is, however authority for post-award preliminary hearings. For example, in Andrews v. Blackburn, Inc., Docket No. 158,135 (July 1996), the Appeals Board, for several reasons, concluded the preliminary hearing procedure may be used in a post-award proceeding. First, the language of K.S.A. 1997 Supp. 44-534a was not, in our opinion, intended to limit the use of preliminary hearings. Instead, it was intended to indicate that the final award would supersede any preliminary hearing order. An application for review and modification reopens the hearing. Second, policy justifications for preliminary hearings before an award continue to exist after an award. The need for a prompt resolution of issues relating to medical care and temporary total disability benefits may be as urgent after an award as before. Finally, the Act contains at least one example where the legislature expressed the authorized use of a preliminary hearing procedure after an award. K.S.A. 1995 Supp. 44-556 authorizes the use of preliminary hearing procedures under K.S.A. 44-534a to enforce rights to medical treatment while a case is pending on appeal before the Court of Appeals. Also, K.S.A. 1997 Supp. 44-551(b)(2)(C) authorizes the use of a preliminary hearing to enforce payment of medical benefits while a case is pending before the Appeals Board.

By affirming the use of a preliminary hearing procedure after an award, the Appeals Board understands it is ratifying a long standing practice that has existed and been followed by the Division and by practicing attorneys generally. The practice is consistent with the statutory scheme of the Act and applicable policy considerations. The ALJ did not

specify at the hearing in this case whether he was conducting a preliminary hearing as a part of a post-award application for medical treatment proceeding, or whether, instead, he considered the proceeding to be a final hearing. Claimant intended it to be a final hearing and did not attempt to introduce medical opinions utilizing the relaxed preliminary hearing standard. Although it is less clear what respondent understood the hearing to be, no request was made by either party for terminal dates and neither party announced any desire to present additional evidence.

The Board recognizes that there is some confusion concerning what procedure is to be followed post-award in proceedings involving medical benefits. Typically, an award will provide for future medical benefits upon application to and approval by the director. Unfortunately, neither the Act nor the regulations set out what form that application should take. An attempt was made this past legislative session to implement such a procedure statutorily. That bill, however, was not enacted. Absent some statutory or regulatory change, or guidance from an appellate court, the Appeals Board will continue to follow its policy of treating post-award applications for medical treatment as preliminary hearings where the matter was heard pursuant to a Form E-3 Application for Preliminary Hearing, it was treated as a preliminary hearing, and the preliminary hearing procedures were followed; but as a final order where the matter came before the ALJ on a motion, it was not treated as a preliminary hearing, and preliminary hearing procedures were not followed.

Although this matter came on for hearing before the ALJ in part pursuant to claimant's filing of a Form E-3 Application for Preliminary Hearing, the Appeals Board finds that the parties treated the medical treatment issue as a post-award motion for review and modification and not as a preliminary hearing. This is evidenced by the fact that the medical evidence was not introduced into the hearing record without foundation as is permitted for preliminary hearings by K.A.R. 51-3-5a. In addition, claimant came before the ALJ on an application for review and modification and the Division issued a May 27, 1998 Notice of Hearing on the application for review and modification. Claimant also served a notice of hearing describing the hearing as being on the motion for review and modification. At the outset of the hearing, the ALJ announced: "We are here on a post award request for medical treatment" and the transcript describes the July 14, 1998 hearing as a review and modification proceeding. The ALJ never described the proceeding as a preliminary hearing. Also, even though terminal dates were not set, neither party requested them or suggested they had additional evidence to present.

After reviewing the record and considering the arguments presented, the Appeals Board finds and concludes the ALJ's Order should be treated as final.

The original Award was entered October 13, 1997 based upon a 7 percent scheduled injury to the arm. At that time claimant had contended she was entitled to a general body disability award because of permanent impairment to her back and neck. The treating physician, however, had testified that claimant's neck and back symptoms had

resolved and claimant had sustained permanent impairment to only her upper extremity. The Appeals Board affirmed the ALJ's Award in its Order of February 18, 1998.

Respondent has authorized additional medical treatment for the left upper extremity but claimant seeks additional treatment for her low back. The record claimant has presented in support of her post-award application for medical treatment contains no new medical testimony and no new medical records or reports. Claimant's testimony that her August 27, 1996 work-related accident included permanent injury to her back is the same claim that was litigated to a conclusion in the original Award. That Award determined not only that claimant had no permanent impairment attributable to the back but further found, based upon the testimony of Dr. John P. Estivo, that her thoracic spine pain and coccyx contusion were resolved.

The ALJ denied claimant's application for additional medical treatment for her back finding claimant failed to meet her burden of proof that her current condition is related to her accidental injury of August 27, 1996. The Appeals Board agrees and the ALJ's Order should therefore be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Jon L. Frobish dated July 17, 1998, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of December 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
William L. Townsley III, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director